

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

DAIRYLAND USA CORPORATION

and

Case Nos. 2-CA-35632
2-CB-19388

LOCAL 348-S, UNITED FOOD AND COMMERCIAL WORKERS,
AFL-CIO

and

MIGUEL PIERRE, An Individual

and

DAIRYLAND USA CORPORATION

and

Case Nos. 2-CA-35633
2-CB-19389

LOCAL 348-S, UNITED FOOD AND COMMERCIAL WORKERS,
AFL-CIO

and

WILLIAM URIZAR, An Individual

Ruth Weinreb, Esq., for the General Counsel.
Harold Weinrich, Esq., *Steven Goodman, Esq.*
and *Christopher Valentino, Esq.*, for Dairyland.
J. Warren Mangan, Esq., for Local 348.

DECISION

Statement of the Case

D. BARRY MORRIS, Administrative Law Judge: This case was heard before me in New York City during 16 days of hearing commencing March 29, 2004. The record was closed on January 11, 2005. Upon a charge filed on July 14, 2003, a consolidated complaint was issued on March 9, 2004, alleging that Dairyland USA Corporation ("Dairyland") violated Section 8(a) (1), (2), (3) and (4) of the National Labor Relations Act, as amended (the "Act"). The complaint further alleged that Local 348-S, UFCW, AFL-CIO ("Local 348 or the "Union") violated Section 8 (b)(1) and (2) of the Act. Respondents filed answers denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses and file briefs. Briefs were filed by the parties on April 25, 2005. Upon

the entire record of the case, including my observation of the demeanor of the witnesses¹, I make the following:

Findings of Fact

5

I. Jurisdiction

Dairyland, a New York corporation, with its principal office and place of business in Bronx, NY, has been engaged in the business of wholesale food distribution. It has been admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. In addition, it has been admitted, and I find, that Local 348 is a labor organization within the meaning of Section 2(5) of the Act.

10

II. The Alleged Unfair Labor Practices

15

A. The Facts

1. Background

On December 13, 2002, John Fazio, Vice-President of Local 348, met with Dean Facatsellis, Vice-President of Dairyland. Fazio provided Facatsellis with information concerning Local 348 and the two discussed the Union's medical plan. In early January 2003², Facatsellis contacted Fazio to further discuss Local 348's medical plan. They also discussed the possibility of entering into a neutrality agreement.

25

On January 7 Fazio prepared a proposed contract which was subsequently sent to Dairyland. On January 23 representatives of the Union and Dairyland met to discuss the medical plan and executed a neutrality agreement. On January 27 Local 348's representatives went to Dairyland's facility to speak with the company's drivers and warehouse employees about joining their union and to obtain executed authorization cards. Pursuant to the terms of the neutrality agreement, on January 31, an arbitrator conducted a card check. The arbitrator determined that Local 348 had obtained 111 valid authorization card signatures from the bargaining unit of 150 employees. The arbitrator certified Local 348 as the bargaining representative of Dairyland's drivers and warehouse employees. On February 1, the parties entered into a four-year collective bargaining agreement.

30

35

2. Testimony of Miguel Pierre

Pierre, a Dairyland driver, testified that on January 27 he met with several representatives of Local 348 in the Dispatch Office. He testified that the meeting took place between 1 and 2 P.M. and that he was introduced to the Union representatives by Mineo Maldonado, Dairyland's Operations Manager. He testified that Maldonado said that the "union was there for us" and would "supply medical benefits".

40

Pierre further testified that a meeting was held between the drivers and Local 348 representatives on June 5. The drivers asked questions about their medical benefits and work

45

¹ Credibility resolutions have been based on the witnesses' demeanor, the weight of respective evidence, established or admitted facts, inherent probabilities, and inferences drawn from the record as a whole.

50

² All dates refer to 2003 unless otherwise specified.

conditions. Pierre also testified that later in June the drivers had a meeting with a Local 202, IBT, representative in the company parking lot. He testified that the dispatcher, Eddie Mercano, was close by, holding a telephone. Soon thereafter Facatsellis appeared and began talking to Mercano. The drivers then left the parking lot.

5

3. Testimony of Juan Flores

Flores is a driver employed by Dairyland. He testified that at the meeting of Local 348 representatives in January, Maldonado was also there and told him "Juan, you should be a member of the union because they give benefits for doctors and eyesight". Flores also testified that Maldonado was present when he signed the authorization card.

10

Flores further testified that a meeting of drivers was held in June at which time a Local 202 representative was present. He testified that the meeting was held in the parking lot and that Mercano came by and was talking on the telephone. Facatsellis came by, shook hands with Mercano and the drivers left. Flores testified that several days later he saw Maldonado who told him that "I know you were at the meeting".

15

On cross-examination, Flores was asked if he discussed his testimony with anyone. He answered that he had not. He was then asked if he had ever discussed his testimony with Ms. Weinreb, counsel for the General Counsel. He testified that he never discussed his testimony with Ms. Weinreb. He conceded that he signed a petition to decertify Local 348. He also conceded that Maldonado's office is separate from the Dispatch Office.

20

25

4. Testimony of Efrain Rodriguez

Rodriguez, a warehouse employee, testified that he was told by his supervisor, Kevin Kelly, to go to the January meeting. He testified that the meeting took place in the Dispatch Office and that three Local 348 representatives were there. He also stated that Maldonado was at the meeting.

30

Rodriguez testified that before he signed the authorization card, "I looked at the green card. At that time I heard Mineo [Maldonado] made a statement to Santana who left the office. And Mineo stated to him that if he didn't sign at the time, he wasn't going to be working there". On cross-examination, Rodriguez testified, "Santana just walked out of the office. Mineo, as he followed him out, said to him if you don't sign the card, you won't be working here".

35

On May 24 a meeting of warehouse employees was held in the "chocolate" room together with Local 348 representatives. Rodriguez testified that he complained about time cards. Rodriguez stated that several days later Kelly told him that "he's hearing things about me he's not liking and that I should put a stop to it. That if I'm unhappy or miserable why I just don't quit".

40

5. Testimony of Carlos Charriez

45

Charriez is a Dairyland warehouse employee. His supervisor is Kevin Kelly. He testified that in January several of the warehouse employees met with Kelly in the chocolate room. He testified that Kelly told them that they "always wanted a union. We finally got you one, and we'd like you to go to Brian [Adair's] office to sign some cards". Charriez testified that Fazio, the Union representative, handed him some cards to sign. Charriez asked Fazio what would happen if he didn't sign. Fazio replied, "you will have to get another job because this is going to be a union shop". Charriez further testified that in May he asked Maldonado what would have

50

happened had he not signed the Union authorization card. Charriez stated that Maldonado replied, "majority rules. You had to sign the cards". Charriez also testified that at the meeting in January, Maldonado was "going in and out of the room" and that he didn't remember whether Maldonado was present when Fazio made the statement about signing the card.

5

6. Testimony of Richardson

Bobby Richardson is a warehouse employee of Dairyland. His supervisor is Kevin Kelly. He testified that in January the day crew was assembled in the chocolate room. Kelly told the employees that "we have a union coming in". The next day Kelly told Richardson "the union's here. Go talk to the union". Kelly went to the Dispatch Office where the Local 348 representatives were present. They handed Richardson a union authorization card and the "highlight" sheet, which listed the benefits the employees would receive. Richardson signed both documents. He testified that Maldonado was present when he signed the card. Richardson also testified that in May he asked Maldonado whether he would still have a job if he hadn't signed the authorization card. Maldonado replied, "The majority rules. If you don't sign in, you don't have a job".

10

15

7. Testimony of Marvin Benjamin

Benjamin is another warehouse employee. His supervisor is Kevin Kelly. He testified that in January Kelly told the warehouse employees, "good news, guys, we've got a meeting." Kelly then said that the employees "have to sign a union card or we won't be in the union". At the end of the meeting Kelly told the employees that "we have to go to Brian's office in groups to sign the union card". Benjamin testified that it was Fazio who told him to sign the card and that Brian Adair was at his desk when he signed the card. Benjamin also testified that Maldonado briefly spoke at the meeting and that he was in the room "just a few moments".

20

25

8. Testimony of William Urizar

Urizar is a Dairyland driver. He testified that at 2:30 P.M. on January 27 he dropped off his keys in Maldonado's office and met several representatives from Local 348. He testified that he stayed in the office for 15 minutes and that Maldonado told him, "That's the union you guys want and sign the card". Urizar further testified that Maldonado told him, "Before you guys paid medical benefits, now it's going to be free, so sign the card". Urizar testified that Maldonado was present when he signed the authorization card.

30

35

Urizar testified that in June the drivers had a meeting in the parking lot. They discussed "how to try to get the Teamsters, Local 202". Eddie Mercano was standing near them with a "walkie-talkie". After ten minutes Dean Facatsellis appeared at which time the drivers left. Urizar testified that two days later John Pappas, Vice-President of Dairyland, called him into his office. Pappas said, "Willie, what were you doing in that meeting? ... We know you were there". Urizar testified that Pappas also said, "those Teamsters are a mafia ... if those Teamsters come into the company, we're going to cut 30 routes".

40

45

Urizar filed a charge in this proceeding on July 14. He testified that his normal route was Route 9, covering the East Side of Manhattan and that he normally made between 19 and 20 deliveries each day. He testified that beginning October, and lasting for 2 – 3 months, his deliveries were increased to 37, at which time he was being sent to Connecticut and Westchester. He testified that prior to October he had never been sent to Connecticut or Westchester.

50

9. Testimony of Torres and Maldonado

Carmen Torres is Maldonado's wife. She testified that she had a 1:30 doctor's appointment on January 27 and that her husband picked her up from home at 1 P.M. She further testified that she came back home at 3:30 and that her husband left for the office at 4 P.M. Maldonado corroborated his wife's testimony and testified that he left Dairyland at 12:30 that afternoon and did not return until 4:45. Maldonado also testified that his office is separate from the Dispatch Office. He shares his office with Brian Adair and there is a door which leads from his office to the Dispatch Office.

10. Testimony of John Fazio

Fazio testified that on January 27 he and the other Local 348 representatives did not meet with employees in Brian Adair's office. He also testified that he did not obtain any authorization cards in Adair's office and that Adair was not present when the authorization cards were signed or when the "highlight" sheet was signed.

B. Discussion and Conclusions

1. January 27 Meeting

Charriez, Richardson and Benjamin appeared to me to be credible witnesses. They testified forthrightly and consistently. To a large extent their testimony corroborated each other. Based on their testimony and the record as a whole I find that a meeting was held on January 27 between Local 348 representatives and the warehouse employees and drivers. The meeting was held in the Dispatch Office. Kelly met with the day crew of the warehouse employees. He told the day crew, which numbered 18 warehouse employees, that they "have to go" to the Dispatch Office "to sign" the Union authorization cards.

I credit Torres' testimony that she had a doctor's appointment on the afternoon of January 27 and that her husband, Mineo Maldonado, took her there. I credit his testimony that he left the company at 12:30 P.M. and did not return until 4:45 P.M.

I credit Rodriguez' testimony that Maldonado was there for part of the meeting. I also credit Charriez' testimony that Maldonado "was going in and out of the room". I further credit Fazio's testimony that Adair was not present when the highlight sheet was signed or when the Union authorization cards were signed. There seemed to have been some confusion in the testimony as to the nature of the Dispatch Office and Maldonado's and Adair's office. Based on the record as a whole I find that the Dispatch Office was separate from Maldonado's and Adair's office. The Dispatch Office was where the employees received their assignments and where they returned their keys. Next to the Dispatch Office, separated by a door, was an office which Maldonado and Adair shared. The January 27 meeting was held in the Dispatch Office.

Urizar testified that he came to the office at 2:30 P.M. and stayed for 15 minutes. He testified that Maldonado was there and told him, "that's the union you guys want and sign the card". I do not credit Urizar's testimony in this regard. I have found that Maldonado was not present at the company from 12:30 until 4:45 P.M.

Flores testified that at the January 27 meeting, Maldonado told him, "Juan, you should be a member of the Union because they give benefits for doctors and eyesight". Flores also testified that Maldonado was present when he signed the Union authorization card. I do not credit Flores' testimony. On cross-examination, Flores conceded that he did not arrive at the

meeting until 1:30 P.M. As I have found earlier, Maldonado was not there at that time. In addition, also on cross-examination, Flores was asked whether he discussed his testimony with anyone. He answered that he had not. He was then asked, several times, whether he discussed his testimony with Ms. Weinreb, counsel for the General Counsel. He testified that he never discussed his testimony with Ms. Weinreb. I find that testimony to be incredible and am not crediting his testimony in this proceeding.

2. Threat of Discharge and Impression of Surveillance

Rodriguez testified that Maldonado followed Santana, a driver, out of the Dispatch Office and told Santana, "if you don't sign the card, you won't be working here". I credit Rodriguez' testimony and find that this constituted a violation of Section 8(a)(1) of the Act. In addition, Rodriguez testified that at a meeting of warehouse employees in the chocolate room, he complained about time cards. Several days later Kelly told him, "he's hearing things about me he's not liking". I credit Rodriguez' testimony and find that this violated Section 8(a)(1) of the Act.

3. Interrogation, Surveillance and Loss of Work

Urizar testified that two days after the June meeting in the parking lot, Pappas called him into his office and said, "Willie, what were you doing at that meeting? ... We know you were there". Pappas also told Urizar, "if those Teamsters come into the company, we're going to cut 30 routes". I credit Urizar's testimony and find that these statements violated Section 8(a)(1) of the Act.

4. Local 348's Majority Status

In cases alleging unlawful Section 8(a)(2) recognition, "it is the burden of proof of General Counsel to establish that the union accorded exclusive recognition was not the majority representative". *Rainey Security Agency*, 274 NLRB 269, 279 (1985). I credit Richardson's testimony that Maldonado was present when he signed the Union authorization card. I have also found that Kelly told the 18 warehouse employees in the day crew that they have to sign the cards. Accordingly, I find that General Counsel has sustained her burden of showing that 19 of the employees were not "uncoerced".

The unit consists of 150 employees. 111 signed authorization cards. Subtracting the above-mentioned 19 cards results in 92 validly signed cards. This constitutes a majority of unit employees. I find that General Counsel has not sustained her burden and the allegation is dismissed.

5. Alleged Onerous Conditions Imposed on Urizar

Urizar filed a charge on July 14 and an amended charge on September 24. The complaint alleges that beginning October 3, Dairyland imposed more onerous work conditions on Urizar.

Urizar testified that his normal route was Route 9, covering the Upper East Side of Manhattan. He further testified that beginning October, for two to three months, his deliveries were increased from an average of 19-20 per day to 37 deliveries. He also testified that prior to October he was never sent to Connecticut or Westchester to make deliveries. After October, however, he testified that he was required to make deliveries to both Connecticut and Westchester.

While Urizar testified that his normal route was Route 9, the record shows otherwise. In fact, from January 1 through September 30, out of 133 deliveries, Urizar was assigned Route 9 only 38 times. Whereas Urizar testified that prior to October he never was assigned deliveries in Connecticut or Westchester, the record shows that during the period January 1 through September 30 Urizar was assigned deliveries in Westchester and Connecticut 13 times. Finally, Urizar testified that beginning October deliveries increased from an average of 19-20 to 37. In fact, however, the record shows that for the period from June 2 through June 30 Urizar's average daily deliveries were 21.5. This actually decreased to 19.75 for the period July 15 through December 30. The decrease took place even though Urizar filed his initial charge on July 14. For the period October 1 through December 30 Urizar's average daily deliveries were 20.8. During this period Urizar was assigned a helper for each delivery. The helper was not removed. I find that General Counsel has not shown that more onerous working conditions were imposed on Urizar. Accordingly, the allegation is dismissed.

6. Other Allegations

The complaint alleges that Maldonado promised increased medical benefits if the employees signed the Union authorization cards. I credit Pierre's testimony that Maldonado introduced the Local 348 representatives on January 27 and said that the Union was "there for us" and would "supply medical benefits". A promise of increased benefits interferes with protected rights and violates Section 8(a)(1) of the Act. See *Gerig's Dump Trucking*, 320 NLRB 1017, 1022 (1996), *enfd.* 137 F. 3d 936 (7th Cir. 1998).

The complaint also alleges that Dairyland directed employees to sign Union authorization cards, in violation of Section 8(a)(2). I have found that Kelly directed the day crew to sign cards on behalf of Local 348. I find this to be a violation of Section 8(a)(2) of the Act. See *Duane Reade, Inc.*, 338 NLRB 943, 944 (2003).

General Counsel maintains that Maldonado engaged in an unlawful act of surveillance in June when he stood outside the drivers' locker room as they met with Local 348 representatives. Urizar, Flores and Pierre testified that they did not see Maldonado at the door. Pantaleon, however, testified that he saw Maldonado at the door for approximately one minute. I do not credit Pantaleon. During recross examination he continually answered questions by saying "I don't remember". I believe that he did remember the answers to many of the questions, but in effect refused to answer the questions posed by counsel for Dairyland. Under such circumstances I believe that his testimony should not be credited. See *Bestway Trucking*, 310 NLRB 651, 661 (1993), *enfd.* 22 F. 3d 177 (7th Cir. 1994).

General Counsel also maintains that Dairyland engaged in surveillance at the parking lot meeting of employees in June. The employees were gathered in a parking lot which was used by several companies, by the employees and where Dairyland's trucks were parked. Mercano appeared not far from where the employees were standing, talking into a cell phone. After about 10 minutes Facatsellis appeared and the drivers left the parking lot. It has not been shown that talking into a cell phone constitutes surveillance. In addition, it has not been shown that Mercano was a supervisor within the meaning of the Act. In any event, I have already found that Dairyland engaged in surveillance on another occasion and therefore the violation will be remedied.

Concerning any allegation not specifically found to be an unfair labor practice, I have

carefully reviewed all of the allegations and find that General Counsel has not sustained her burden of showing that Respondent has violated the Act with respect to any other allegation.³

Conclusions of Law

1. Dairyland is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating employees about their union activities, by engaging in surveillance and creating the impression of surveillance of protected activities, by threatening discharge and by threatening loss of work for protected activities, and by promising increased medical benefits, Dairyland has committed unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By directing its employees to sign Union authorization cards, Dairyland has committed an unfair labor practice within the meaning of Section 8(a)(1) and (2) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondents did not violate the Act in any other manner alleged in the complaint.

Remedy

Having found that Dairyland has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

Respondent, Dairyland USA Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees about their union activities, engaging in surveillance and creating the impression of surveillance of protected activities, threatening discharge, threatening loss of work and promising medical benefits for protected activities.

(b) Directing employees to sign union authorization cards.

³ General Counsel has moved to withdraw Paragraph 9(c) of the complaint and that portion of Paragraph 8(a) which refers to Adair. The motion is granted.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

5 2. Take the following affirmative action necessary to effectuate the policies of the Act:

10 (a) Within 14 days after service by the Region, post at its facilities in English and Spanish, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's
15 authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility
involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 27, 2003.

20 (b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

25 IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. , July 19, 2005.

30

D. Barry Morris
Administrative Law Judge

35

40

45

50 ⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

5 Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

10 The National Labor Relations Board has found that we violated Federal labor law and has
ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

15 Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

20 WE WILL NOT interrogate you about your union activities, engage in surveillance or create the
impression of surveillance, threaten discharge or loss of work or promise increased medical
benefits for engaging in protected activities.

WE WILL NOT direct you to sign union authorization cards.

25 WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the
exercise of the rights guaranteed to you by Section 7 of the Act.

DAIRYLAND USA CORPORATION

30 (Employer)

Dated _____ By _____
(Representative) (Title)

35 The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor
Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it
investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under
the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's
Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

40 26 Federal Plaza, Federal Building, Room 3614
New York, New York 10278-0104
Hours: 8:45 a.m. to 5:15 p.m.
212-264-0300.

45 THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST
NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS
NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S
50 COMPLIANCE OFFICER, 212-264-0346.